SUPREME COURT, U.S.
FILED
AUG 31 2005
OFFICE OF THE CLERK

No. 05-285

In The

Supreme Court of the United States

WENDY LALANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LEEZA R. CHERNIAK
LAW OFFICES OF LEEZA R. CHERNIAK
1800 Peachtree Street
Suite 300
Atlanta, Georgia 30309
(404) 355-3031
Counsel for Petitioner Wendy Lalani

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I. WHETHER THE ELEVENTH CIRCUIT IS CORRECTLY APPLYING PLAIN ERROR REVIEW TO SENTENCES PURSUANT TO *UNITED STATES V. BOOKER* WHERE THE ELEVENTH CIRCUIT IS APPLYING PLAIN ERROR REVIEW IN A MANNER WHICH CONFLICTS WITH OTHER CIRCUITS AND WHERE ALL THREE CO-PETITIONERS WERE SENTENCED TO LOWEST END OF GUIDELINE RANGE AND DISTRICT JUDGE STRUGGLED WITH SUBSTANTIAL MOTION FOR DOWNWARD DEPARTURE.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	6
I. WHETHER THE ELEVENTH CIRCUIT IS CORRECTLY APPLYING PLAIN ERROR REVIEW TO SENTENCES PURSUANT TO *UNITED STATES V. BOOKER* WHERE THE ELEVENTH CIRCUIT IS APPLYING PLAIN ERROR REVIEW IN A MANNER WHICH CONFLICTS WITH OTHER CIRCUITS AND WHERE ALL THREE CO-PETITIONERS WERE SENTENCED TO LOWEST END OF GUIDELINE RANGE AND DISTRICT JUDGE STRUGGLED WITH SUBSTANTIAL MOTION FOR DOWNWARD DEPARTURE	6
CONCLUSION	12
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT:

Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004) 4, 6

Johnson v. United States, 520 U.S. 461, 117 S. Ct. 1544 (1997) 7

United States v. Booker, 543 U.S. ___, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005) ..... *passim*

United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770 (1993) 7

UNITED STATES CIRCUIT COURTS OF APPEAL:

United States v. Ameline, 409 F. 3d 1073 (9th Cir. 2005) 10, 11

United States v. Antonakopoulos, 399 F. 3d 68 (1st Cir. 2005) 10

United States v. Barnett, 398 F. 3d 516 (6th Cir. 2005) 9

United States v. Coles, 403 F. 3d 764 (D.D.C. 2005) 7

United States v. Crosby, 397 F. 3d 103 (2d Cir. 2005) 9

United States v. Davis, 407 F. 3d 162 (3rd Cir. 2005) 9

United States v. Demarick, No. 04-15136 (11th Cir. July 12, 2005) 8

United States v. Ellefson, No. 04-1293 (8th Cir. August 23, 2005) 8

United States v. Espinoza-Gamez, No. 04-50415 (5th Cir. June 3, 2005) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Fields, 408 F. 3d 1356 (11th Cir. 2005) 8

United States v. Hamm, 400 F. 3d 336 (6th Cir. 2005) 8, 9

United States v. Henry, 408 F. 3d 930 (7th Cir. 2005) 9

United States v. Hughes, 401 F. 3d 540 (4th Cir. 2005) 10

United States v. Hughes, 396 F. 3d 374 (4th Cir. 2005) 7

United States v. Leisure, 412 F. 3d 857 (8th Cir. 2005) 8

United States v. Paladino, 401 F. 3d 471 (7th Cir. 2005) 7. 11

United States v. Rodriguez, 398 F. 3d 1291 (11th Cir.), *cert. denied*, 162 L.Ed. 2d 866, 125 S. Ct. 2935 (2005) 6, 7

United States v. Rone, No. 04-5682 (6th Cir. July 27, 2005) 9

United States v. Williams, 399 F. 3d 450 (2d Cir. 2005) 7

PETITION FOR A WRIT OF CERTIORARI

The Eleventh Circuit denied relief under *United States v. Booker*, 543 U.S. ___, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005), in an opinion that incorrectly applies the plain error analysis, conflicts with other circuits, and condemns the petitioner to serve an illegal sentence.

OPINIONS BELOW

The opinions of the Eleventh Circuit are *United States v. Lalani*, No. 04-11114 (11th Cir. April 12, 2005) and *United States v. Lalani*, No. 04-11114-II (11th Cir. June 8, 2005) and are attached hereto as Appendices A and B of this Petition.

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by Title 28, United States Code, § 1254. This petition seeks review of a judgment by a panel of the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit Court issued an unpublished opinion affirming the conviction and sentence on April 12, 2005. The petitioner filed a petition for reconsideration and for rehearing *en banc* which was denied on June 8, 2005.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

(i) Course of Proceedings

Petitioner Wendy Lalani is a 37 year old mother of two. Her husband, co-petitioner Amzad Lalani is the 42 year old father of their two children. Neither have any criminal history.

Petitioner Wendy Lalani was arrested, as were numerous co-defendants, on March 14, 2002 on a 138 count indictment, alleging a conspiracy to transport in interstate commerce stolen goods, as well as related substantive counts. The trial commenced on September 8, 2003 and concluded with a conviction on September 17, 2003. She was free on bond until her voluntary surrender to serve the 63 month sentence imposed after conviction at trial. Petitioner Lalani is presently incarcerated and serving a custodial sentence of 63 months. Her husband, co-petitioner Amzad Lalani is serving a custodial sentence of 121 months.

(ii) Statement of Facts

In the year 2000, Amzad Lalani, who owned a convenience store, went into the wholesale distribution business, selling typical convenience store items, such as razors and over the counter medications. The business was called Amber Distributors. The facts urged by the government were essentially that cooperating defendant Mohammad Gaffar conducted a theft and fencing operation out of his own convenience store in Atlanta, Georgia, using his employees to purchase stolen merchandise from "boosters" and then sell it to Amber Distributors or other customers with wholesale businesses.

At sentencing, the District Judge himself characterized the trial testimony regarding Wendy Lalani as follows:

> **I think I do agree with you Ms. Cherniak, that the number of occasions in the record that showed her participation and her presence were random and only a few.**

Wendy Lalani has been married to Amzad Lalani since she was 19 years old. The government alleged that Wendy Lalani participated in the conspiracy by "cleaning" the merchandise at Amber Distributors. The government alleged that the total value of all the merchandise handled by the conspiracy was over $13 million. At sentencing the court found that the retail value of said merchandise was $9 million. That value drove the sentencing calculation under the then mandatory guideline scheme. In addition to the amount of loss, other guideline sentencing enhancements were applied at sentencing which were found by the judge, not by the jury beyond a reasonable doubt. The trial court sentenced all three of the co-petitioners to

the lowest end of the guideline range. The trial court struggled with Ms. Lalani's motion for downward departure based on significant family responsibilities, but denied same believing that it could not depart unless her circumstances were even more extraordinary than they were.

Ms. Lalani's sentencing occurred before this Court's decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004). However, the evidence for a lower sentence presented by Ms. Lalani was substantial and compelling. Ms. Lalani married her husband, co-petitioner Amzad Lalani, at 19 to escape an abusive home with an alcoholic father. She worked in her husband's convenience store from 1995 until 2000. In 2000, when her husband opened the wholesale distribution business, she went to work there until the date of her arrest in March 2002. She remained successfully on bond from March 2002 until she reported to serve her 63 month sentence in June 2004.

As presented at sentencing, Ms. Lalani's sister was diagnosed with AIDS when she was just 19 years old and later had a child out of wedlock. Her child, Aaron, was 15 years of age at the time of sentencing. He was born HIV positive. On September 19, 2003, Ms. Lalani's sister died from AIDS related illnesses after spending many months in hospital and hospice care. Upon his mother's death, Aaron was simply dropped off at a stranger's house by the mother's boyfriend, resulting in his custody initially being with the Florida Department of Children and Family. Through Wendy Lalani's efforts, Aaron came to live with her family in May 2003. Not only was this a struggle financially, but also emotionally, as Aaron only reads on a third grade level and suffers from mental health problems.

As further presented to the sentencing court, Ms. Lalani's own son, Adam, has a learning disability and is enrolled in a special education program. Ms. Lalani persevered to get Adam a partial scholarship to a private school that specialized in addressing Adam's unique needs, and struggles to pay the difference in the cost of his education by family efforts to curb spending. Details of both Aaron's and Adam's special needs were presented to the sentencing court. In addition, Aaron's therapist noted that a change in Aaron's environment could be devastating for the child.

Other factors presented to the sentencing court were the fact that both parents would be simultaneously incarcerated and that Ms. Lalani's mother was quite old and infirm. In addition, more traditional sentencing information was presented, such as letters from friends, neighbors, teachers and co-workers who wrote of their respect and admiration for Wendy Lalani and all she contributes to her family and the community.

The District Court seemed moved by the facts and struggling with what he believes to be a "problem under our present system of law," noting,

> I had a recent case with like 18 defendants where many of the defendants were single mothers that had simply been brought into a situation where they were used to carry checks, fraudulent and forged checks, to a bank. They knew what they were doing. They knew it was wrong, but it resulted in their children not having the support they needed, and I'll have to agree with you that's a series [sic] situation, and it's certainly a problem under our present system of law.
>
> But I tell you quite frankly that I wouldn't know what to say to one of those people if I treated Ms.

Lalani differently when her situation is not more extraordinary than many of those.

Thus, it was evident that the District Court was troubled by what he perceived to be a lack of discretion to give a lower sentence under these types of circumstances.

Wendy Lalani appealed her conviction on several grounds, raising numerous trial and sentencing issues, including *Blakely* and *Booker* issues. After a very active oral argument, with lengthy discourse on many of the significant issues raised on appeal, the conviction and sentence was affirmed. A petition for rehearing *en banc* followed, which again denied relief based upon *United States v. Rodriguez*, 398 F. 3d 1291 (11th Cir.), *cert. denied*, 162 L. Ed. 2d 866, 125 S. Ct. 2935 (2005).

REASON FOR GRANTING THE WRIT

I. WHETHER THE ELEVENTH CIRCUIT IS CORRECTLY APPLYING PLAIN ERROR REVIEW TO SENTENCES PURSUANT TO *UNITED STATES V. BOOKER* WHERE THE ELEVENTH CIRCUIT IS APPLYING PLAIN ERROR REVIEW IN A MANNER WHICH CONFLICTS WITH OTHER CIRCUITS AND WHERE ALL THREE CO-PETITIONERS WERE SENTENCED TO LOWEST END OF GUIDELINE RANGE AND DISTRICT JUDGE STRUGGLED WITH SUBSTANTIAL MOTION FOR DOWNWARD DEPARTURE.

Judge Posner of the United States Court of Appeals for the Seventh Circuit has said of the Eleventh Circuit's tortured plain error analysis in *Blakely* pipeline cases:

> **[W]e cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence.**

See United States v. Paladino, 401 F. 3d 471, 485 (7th Cir. 2005) (emphasis added). Numerous other courts have similarly directly criticized the Eleventh Circuit's interpretation of plain error under *Booker*. *See United States v. Coles*, 403 F. 3d 764 (D.D.C. 2005) (criticizing the Eleventh Circuit's decision in *Rodriquez*, infra, and following the Seventh Circuit approach to simply ask the district judge whether a different sentence would have been given); *United States v. Hughes*, 401 F. 3d 540 (4th Cir. 2005) (noting that the Eleventh Circuit's language "demonstrates a fundamental misunderstanding of what it means to affect substantial rights"); *United States v. Williams*, 399 F. 3d 450 (2d Cir. 2005) (criticizing Eleventh Circuit approach, noting, "no reason to risk leaving in place a sentence that might be materially lower or higher" than the one that would have been imposed absent the error).

In *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770 (1993), this Court held that in order to satisfy the plain error test, the defendant must demonstrate (1) error, (2) that it is plain, and (3) that it affects substantial rights. If these three conditions are met, an appellate court may then exercise its discretion to notice the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544 (1997).

The Eleventh Circuit has held, like the other circuits, that a *Booker* error is an error which is plain. *See United States v. Rodriguez*, 398 F. 3d 1291 (11th Cir. 2005). Where the Eleventh Circuit's plain error analysis conflicts with